HOLLY H. BACA
ESTATE OF ANTHONY K. BACA

IBLA 85-839 Decided April 30, 1987

Appeal from a decision of the Albuquerque District Office, Bureau of Land Management, rejecting color-of-title application NM 57845.

Set aside and remanded.

1. Accretion -- Boundaries -- Color or Claim of Title: Applications

When a patent to the land incorporates by reference a description of the land as being bounded by a river and the land described in the color-of-title application is for the land accreted to the applicant's property, the applicant as the riparian owner has title to the accreted lands. Neither a color-of-title application nor a sale of the lands to the applicant by BLM would be proper.

2. Avulsion -- Boundaries -- Color or Claim of Title: Applications

Where BLM has rejected a color-of-title application for land described as being bounded on the north by a river and there is evidence showing that the applicant may in fact have color of title to the land if it avulsed to her property, the decision will be set aside and remanded to BLM for consideration of whether title to the land is in the United States.

APPEARANCES: Timothy Meehan, Esq., Taos, New Mexico, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Holly H. Baca and the Estate of Anthony K. Baca appeal from a decision of the Albuquerque District Office, Bureau of Land Management (BLM), dated July 22, 1985, rejecting a class 1 application under the Color of Title Act, 43 U.S.C. § 1068 (1982), for lot 33, sec. 19, T. 23 N., R. 10 E., New Mexico Principal Meridian, containing 0.15 acres, as shown on the survey approved April 12, 1985, and the land extending north from lot 33, to the Embudo River.

BLM rejected appellants' application because 43 CFR 2540.0-5(b) requires that a claim must have been held in good faith and in peaceful adverse possession by a claimant, his ancestors, or grantors. BLM found that appellants failed to:

> 1. Submit evidence to describe the parcel applied for and the lack of a document from a source other than the United States, which on its face purports to convey the land applied for to the applicant or his predecessors;
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> 2. Meet the good faith requirement of the Color of Title Act, in that all deeds specifically describe the boundaries of small holding claim No. 560 Tract No. 3 and the applicant knew or should have known the boundaries to which they had a legally vested interest or title.
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> 3. Another major defect in good faith occurs where the applicant asserts the basis for the claim results from the fact they, "purchased the property and there is a chain of title since 1908 by U.S. Patent." The applicant can not rely on a patent from the United States to support a color-of-title claim. If the land applied for was included in the patent there would be no need for the applicant to file a color-of-title application; they would in fact have actual title. See Margaret C. Moore, 5 IBLA 252, 254 (1972).

BLM added that the sale of lot 33, containing 0.15 acres is being considered for direct sale under section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982). No mention was made of the open space land between lot 33 and the Embudo River.

In their statement of reasons appellants note that the BLM District Office defined the parcel in issue by survey approved April 12, 1985, as consisting of small holding claim No. 560, Tract No. 3 as 1.468 acres, and excluded the land continuing to the Embudo River, consisting of approximately 0.15 acres. This excluded land has been further defined by BLM as two sub-parcels, lot 33 and an open space along the Embudo River. Appellants assert that in its correspondence, BLM emphasized that the acreage in all deeds remained 1.468 acres whether or not the river was listed as a boundary, and thus would not allow for additional acreage to the river. 1/ Appellants contend that BLM has ignored the fact that prior deeds describe the boundary on the north to the Baca parcel as the Embudo River. Appellants also assert that BLM has failed to consider a February 16, 1982, survey by John P. Montoya surveying the parcel as 1.50 acres more or less. Appellants submit that this survey and the prior deeds describing the property as bounded on the north by the Embudo River, explained by the theory of accretion, support the application for lot 33 and the additional land to the river.

1/ See letter of May 21, 1985, from BLM District Manager to appellants' attorney.

Appellants assert that BLM should be estopped from asserting that the Bacas cannot rely on a patent from the United States to support their color-of-title claim. They contend that BLM cannot reject their application for color-of-title patent to the public lands because the applicants base their claim on a description in a patent document.

A review of pertinent documents is necessary for the resolution of this appeal. By patent dated April 2, 1908, the United States granted certain lands, including Tract No. 3 of small holding claim No. 560 to Matias Romero. The patent was issued pursuant to the provisions of sections 16, 17, and 18 of the Act of March 3, 1891, 26 Stat. 854, as amended by the Act of February 21, 1893, 27 Stat. 470. The Act of March 3, 1891, was entitled "An Act to establish a court of private land claims and to provide for the settlement of private land claims in certain States and Territories." The land description in the patent reads as follows: "The Tracts one, two, and three of Section nineteen and the Tract four of Section nineteen and twenty in Township twenty-three north of Range ten east of the New Mexico Meridian, New Mexico, containing twenty-two and sixty-eight-thousandths acres, Small Holding Claim, five hundred and sixty."

The patent refers to certificate 487 signed by the Register and Receiver, Land Office, Santa Fe, New Mexico, certifying that Matias Romero had made satisfactory proof of the continuous adverse possession by him, or his ancestors, grantors, or their lawful successors in title or possession for a period of 20 years next preceding the survey of small holding claim No. 560, Tracts No. 1, 2, 3, sec. 19, and Tract No. 4, secs. 19 and 20, in T. 23 N., R. 10 E., New Mexico Principal Meridian, containing 22.068 acres. The Small Holding Proof affidavit of applicant contains the following description of Tract No. 3: "Tract No. 2 [sic] is bounded N. by Rio Embudo, E. by public land, S. by the hills, W. by lands of Luciano Trujillo." 2/ It is clear from these documents that land conveyed to Matias Romero was bounded on the north by the Embudo River.

Appellants submitted several abstracts of title and surveys identifying Tract No. 3 of small holding claim No. 560. Appellants trace title from the 1908 patent through a series of conveyances. A warranty deed dated October 6, 1928, from the heirs of Matias Romero to Paul and Margarette Williams describes a parcel of land "#560, Tract 3 of the Matias Romero parcel -- 1.468 acres, Bounded on the West by Jose Luciano Trujillo's place -- West N.4° E. 2.20 chains or to River." By quitclaim deed dated January 2, 1933, Octaviano Romero conveyed "Parcel #560, Tract #3 of Matias Romero 1.468 (acres)" to Paul and Margarette Williams. The Embudo River was not listed as a boundary. The Williams conveyed the property to George D. Rogers by warranty deed dated February 4, 1933. The property description read, "Said parcel of land #560, Tract 3 of the Matias Romero Parcel 1.468 acres, Bounded on the west by Jose Luciano Trujillo's place west N.4° E. 2.20 chains or to River, * * *." In 1936 George D. Rogers brought an

2/ Based on our review of other documents and maps in the file, we have determined that this description applies to Tract No. 3.

action to quiet title to his property against Paul and Margarette Williams and other defendants. In its final decree the District Court of the First Judicial District, County of Rio Arriba, State of New Mexico, found the Williams to be fee simple owners of Tract 3 of sec. 19, T. 23 N., R. 10 E., containing 1.468 acres, small holding claim No. 560 according to the official plat of survey on file in the United States General Land Office, and bounded on the north by the Embudo River. A mortgage deed was executed February 5, 1936, with George and Ilia Rogers as grantor and C. R. Bass as grantee, which gave the Embudo River as the northern boundary. The Rogers failed to pay the debt secured by the mortgage, the mortgage was foreclosed, and the property sold. The property was conveyed by special master's deed dated April 11, 1942 (John T. Watson, Special Master), to Jane and Hugh L. Bass. In all documents pertaining to this sale of 1.468 acres, the Embudo River was given as the northern boundary in the land description.

Meanwhile, on December 1, 1937, George and Ilia Rogers had executed a mortgage deed naming Espanola State Bank as grantee. Tract No. 3 of small holding claim No. 560 containing 1.468 acres was the security for the loan. The Embudo River was listed as the northern boundary. A release of the mortgage dated December 8, 1945, verifies that the indebtedness secured by the mortgage had been fully paid.

On August 30, 1945, Hugh and Jane Bass conveyed the property containing 1.468 acres to I. L. Brasher by warranty deed. The Embudo River was again the northern boundary. I. L. Brasher and Marbelle F. Brasher conveyed the property to Tom C. and Alice Martinez by warranty deed of June 13, 1962, which described Tract No. 3 of small holding claim No. 560 as "within Section Nineteen (19) in Township Twenty-three (23) North of Range Ten (10) East of the New Mexico Meridian, New Mexico, containing one and four hundred sixty-eight thousandths (1.468) of an acre * * *." This deed excepted a right-of-way grant to the State of New Mexico and made no mention of the Embudo River. Tom and Alice Martinez conveyed Tract No. 3 of small holding claim No. 560 to Antonio M. and Catherine R. Baca by warranty deed of July 31, 1971. The property description for 1.468 acres excepted a right-of-way easement to the State of New Mexico and made no mention of the Embudo River. By warranty deed executed October 23, 1982, Antonio M. and Catherine R. Baca conveyed Tract No. 3 of small holding claim No. 560 containing 1.468 acres to Anthony K. and Holly H. Baca. This deed also excepted a right-of-way to the State of New Mexico and made no mention of the Embudo River.

In addition to the deeds in the chain of title, appellants have submitted a survey by John P. Montoya, dated February 16, 1982, surveying the parcel as 1.50 acres more or less, and listing the Embudo River as a boundary. This may be read in conjunction with the notes of John H. Walker, U.S. Deputy Surveyor, dated August 16, 1904, which stated that small holding claim No. 560, Tract No. 3, contained 1.468 acres and listed the Embudo River as a boundary.

Initially, we refer to BLM's letter to appellants dated May 21, 1985, in which BLM notes that all deeds submitted by appellants make reference to small holding claim No. 560, Tract No. 3, as being 1.468 acres. BLM points

out that certain deeds make reference to the parcel as being bounded on the north by the Embudo River, but they identify the acreage as being 1.468 acres which is precisely the same acreage as small holding claim No. 560. BLM implies that there is no additional acreage to the river.

In construing and interpreting a conveyance where the location of the boundary lines is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance, the courts have held that the recital of quantity or area of land conveyed or retained will be least influential. See United States v. Johnson, 39 IBLA 337, 344-45 (1979), and cases cited therein. We find that the call in the conveyances to the Embudo River takes precedence over the recital of 1.468 acres.

[1] There is no question that appellants have title to small holding claim No. 560. This appeal concerns the parcel of land between that land identified during the course of the survey approved on April 12, 1985, as small holding claim No. 560 and the Embudo River. This parcel includes lot 33 consisting of 0.15 acres, and an open space along the Embudo River.

A threshold issue for consideration is whether the United States owns the parcel in question. This land may, in fact, be rightfully owned by appellants if the land accreted to small holding claim No. 560. Accretions or accreted lands are additions to the area of realty from gradual deposit by water of solid material, whether mud, sand, or sediment, producing dry land which before was covered by water, along banks of navigable or unnavigable bodies of water. 3 A. Casner, American Law of Property § 15.26 (1952).

The generally accepted rule governing accretions holds that title to the accreted land belongs to the riparian owner. Bear v. United States, 611 F. Supp. 589 (D. Nebraska 1985); California ex. rel. State Lands Commission v. United States, 457 U.S. 273, 280 (1982); Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890); David A. Provinse, 35 IBLA 221, 85 I.D. 154 (1978). If this is the case, appellants have title to the property in question, and neither a color-of-title application nor a sale of lot 33 to appellants would be proper. See Ralph F. Rosenbaum, 66 IBLA 374, 384-85, 89 I.D. 415, 421 (1982).

If it is determined that the United States does not have title to this land because the land in question has accreted to the riparian owner, the description resulting from the 1985 survey created a cloud on the title to the land. In such event BLM and appellants may wish to explore issuance of recordable disclaimers of interest to appellants, pursuant to section 315 of FLPMA, 43 U.S.C. § 1745 (1982). That section authorizes issuance of such instruments "where the disclaimer will help remove a cloud on the title of such lands and where [the Secretary] * * * determines * * * (3) accreted, relicted, or avulsed lands are not lands of United States." 43 U.S.C. § 1745(a) (1982). The disclaimer of interest is in effect a quitclaim deed from the United States. 43 U.S.C. § 1745(c) (1982). See Ralph F. Rosenbaum, supra at 388, 89 I.D. at 422-23.

[2] If, however, the land in question was formed by avulsion rather than accretion, title might be in the United States. The rule of avulsion,

enunciated in St. Louis v. Rutz, 138 U.S. 226 (1891), states that sudden and perceptible changes in the course of a river do not deprive riparian owners of their land. In such case, the ownership must be determined based upon the ownership prior to avulsion. If the property on the opposite side of the river was owned by the United States prior to avulsion, then title to the land in issue would remain in the United States and the color-of-title application would be appropriate, based upon the description in the various deeds conveying land to the Embudo River. If the property on the opposite side of the river was in private ownership, title to the land in issue would remain in the private owner, and the matter must be settled between appellants and the private owner.

If BLM finds the land to be avulsed, rather than accreted, BLM must determine whether title to the land is in the United States, and then make a determination as to whether appellants' color-of-title application is appropriate.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded to BLM for action consistent herewith.

R. W. Mullen
Administrative Judge

We concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

Will A. Irwin
Administrative Judge